SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 903

JAMES HENRY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari Directed to the United States Court of Appeals for the Ninth Circuit.

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TO THE HONORABLE CHIEF JUSTICE EARL WARREN AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Comes now James Henry and petitions this Honorable Court for a writ of certiorari to review and reverse a judgment finding him guilty of Counts 1, 2 and 4 of receiving motor vehicles moving in and part of interstate commerce, knowing them to have been stolen, in violation of Title 18, Section 659, U.S. Codes.

The judge gave the jury 20 minutes in which to find the verdict (R.T. 296) and it is contended this was unconstitutional psychological pressure. (People v. Dye, 119 Cal.App. 262; Gros v. United States, 136 F.2d 878)

Jurisdiction

Jurisdiction is conferred by Title 28, Section 1254(1), U.S. Codes.

The opinion of the Court of Appeals was rendered May 23, 1966. Although rehearing was denied June 30, 1966, counsel for the appellant and petitioner was not notified and the Court of Appeals, on being so advised, vacated its judgment on November 9, 1966. A copy of said order and notice is attached hereto, marked Appendix A, and made a part hereof. The petition for rehearing was denied on November 30, 1966.

Statutes and Constitutional Provisions Involved

The statutes and constitutional provisions involved are: Title 18, Section 659, U.S. Codes and the Fifth and Sixth Amendments to the Constitution of the United States, all of which are set out in Appendix B, and made a part hereof.

Opinion Below

The opinion of the United States Court of Appeals is contained in 361 F.2d 352. A copy of said opinion is attached hereto as Appendix C, and made a part hereof.

Brief Statement of Facts

Petitioner was charged and convicted of knowingly receiving and possessing 22 packages of pressure regulators which allegedly had been stolen from an interstate shipment of goods. (18 U.S.C. Sec. 659).

The jury, after deliberating, came into court after they were threatened with being locked up over the weekend and further threatened that they would not be able to get their automobiles, which they had left in and around the Federal Building in four different parking lots and

which involved the safety of the automobiles of the jurors. The jurors were given 20 minutes to see if they could arrive at a verdict. (R.T. 292-296) The jurors then came in with a verdict of guilty and the petitioner was given a sentence of three years in the penitentiary.

Petitioner testified in his own behalf but was not asked, nor did he testify, whether or not he knew the regulators which were in issue were stolen. He confronted the prosecution with this opportunity and the presumption of innocence with which he was clothed necessarily must be applied under such circumstances to find that he was and is innocent of the crime. Petitioner testified as follows:

> "This was supposedly junk. John told me he got this stuff, or somebody got this stuff, off of a dump and he was going to break it up for metal and when he told me he was going to break it up for metal I thought maybe I might make a quarter, so this is why I went into it." (R.T. 220)

Implicit in this answer that it was supposedly junk and it came off of a dump was the answer that he did not know it was stolen. Furthermore, the burden of proof that it was stolen was upon the government as an essential part of its case. The government did not meet this burden. (*Coffin v. United States,* 162 US 664, 40 L.ed. 1109)

Questions Presented

1. Whether giving the jurors just 20 minutes to see if they could arrive at a verdict was psychological pressure of such a character as to violate due process of law and fair trial guaranteed by the Fifth Amendment to the Constitution of the United States.

2. Whether giving jurors just 20 minutes to see if they could arrive at a verdict denies petitioner the right to a jury trial as provided for by the Constitution of the United States in its Fifth and Sixth Amendments.

3. Whether a conviction based on a total lack of evidence of any guilty knowledge or guilty intent violates the due process clause of the Fifth Amendment to the Constitution of the United States.

4. Whether the government has met the burden of proof required in a criminal case.

Reasons for Granting the Writ

The Court should grant a hearing in its supervisory capacity over criminal justice to hold that jurors should have unlimited time to see if they can arrive at a verdict, without any pressure, psychological, timewise, or otherwise, or in respect to the protection of their automobiles or the hour when they may go home.

The Court stated in its opinion:

> "The trial judge did urge the jury to return a verdict . . . Some little psychological pressure was put on the jury."

The pressure put on the jury was a time limit within which to return its verdict with a threat to be locked up over the weekend. A second threat was in respect to getting their automobiles which were in four different parking lots near the Federal Building and involved the safety of the automobiles of the jurors. (R.T. 292, 296)

The jurors were given 20 minutes to see if they could arrive at a verdict. (R.T. 296) This type of psychological pressure in securing a confession voided the confession. (*Gros v. United States,* 136 F.2d 878; *People v. Dye,* 119 Cal.App. 262)

Any coercion which induces a verdict, and this certainly did, is in violation of due process of law guaranteed by the Fifth Amendment. See also the following cases: *United States v. Smith,* 303 F.2d 341; *United States v. Dunkel & Co.,* 173 F.2d 506; *United States v. King,* 162 F.2d 594; *United States v. Winters,* 158 F.2d 674; *United States v. Sourcey,* 151 F.2d 899; *Brassfield v. United States,* 262 US 448; *Cook v. United States,* 254 F.2d 871; *Butler v. United States,* 254 US 875; *Stewart v. United States,* 400 F.769; *Nigro v. United States,* 4 F.2d 781.

A second reason for granting the writ is the supervisory power of this Court over criminal justice in holding that guilty knowledge is an essential element for the prosecution to prove in a criminal case and lack of such proof invalidates a conviction. (*People v. Gory,* 28 Cal. 2d 450)

In the *Gory* case, the Supreme Court of California held that guilty knowledge was an essential matter to be proved in connection with the possession of marijuana.

See also: *Bollenbach v. United States,* 326 US 607, 90 L.ed. 350; *Tot v. United States,* 319 US 463, 87 L.ed. 1519.

In *Tot v. United States* this Court held that the mere possession of a pistol coupled with conviction for a prior crime was not evidence proving that the pistol had been shipped or transported in interstate commerce.

In *Bollenbach v. United States* this Court held that an instruction that possession of stolen property in another state than that in which it was stolen, shortly after the theft, raises a presumption that the possessor was the thief and transported stolen property in interstate commerce was erroneous.

In the *Bollenbach* case, the jury was unable to find guilt in the light of the main charge after 7 hours but reached a verdict of guilty under the conspiracy count 5 minutes after their inquiry was answered by an untenable legal proposition.

In the instant case the jury, unable to agree after long deliberation, reached their verdict when they were told they had only 20 minutes to deliberate.

We ask this Court to review the facts and judgment in this case and hold that the judgment is in conflict with the holdings of this Court and that the judgment herein was based upon coercion.

Respectfully submitted,

MORRIS LAVINE
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES HENRY
Appellant

vs.

UNITED STATES OF AMERICA
Appellee

FILED
Nov. 9 1966
WM. B. LUCK, *Clerk*
No. 20322

Order on Motion

BEFORE: BARNES AND KOELSCH, Circuit Judges, TAYLOR, District Judge

Good cause appearing therefore, IT IS ORDERED, that the judgment herein, issued on July 8, 1966, be, and it hereby is, recalled.

STANLEY W. BARNES

M. OLIVER KOELSCH
U.S. Circuit Judges

FRED M. TAYLOR
U.S. District Judge

APPENDIX B

Statutes and Constitutional Provisions Involved

Title 18, Section 659, U.S. Codes:

§ 659. Interstate or foreign baggage, express or freight; State prosecutions

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or

has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen—

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts. June 25, 1948, c. 645, 62 Stat. 729; May 24, 1949, c. 139, § 13, 63 Stat. 91.

Fifth Amendment, United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment, United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX C

James HENRY, Appellant,

v.

UNITED STATES of America, Appellee.

No. 20322.

United States Court of Appeals

Ninth Circuit.

May 23, 1966.

Rehearing Denied June 30, 1966.

Prosecution for knowingly receiving and possessing goods stolen from interstate commerce. The United States District Court for the Southern District of California, Central Division, Peirson Hall, J., entered judgment of conviction, and defendant appealed. The Court of Appeals, Barnes, Circuit Judge, held that fact that trial judge urged jury to return a verdict and stated that they should be able to decide the case did not constitute pressure exceeding permissible bounds.

Affirmed.

1. Receiving Stolen Goods 3(4)

Evidence, including fact that defendant usually asked for bill of sale when purchasing merchandise, but did not do so, entitled jury to infer that defendant had necessary knowledge that goods had been stolen. 18 U.S.C.A. § 659.

2. Criminal Law 1159(3)

Court of Appeals was not authorized to interfere with jury's conclusions on contested issue of fact.

3. Criminal Law 365(1)

That trial judge urged jury to return a verdict and stated that they should be able to decide the case did not constitute pressure exceeding permissible bounds.

Saul J. Bernard, Los Angeles, Cal., for appellant.

Manuel L. Real, U. S. Atty., John K. Van De Kamp, Asst. U. S. Atty., Chief, Crim. Div., J. Brin Schulman, Asst. U. S. Atty., Asst. Chief, Crim. Div., Anthony Michael Glassman, Asst. U. S. Atty., Los Angeles, Cal., for appellee.

Before BARNES and KOELSCH, Circuit Judges, and TAYLOR, District Judge.

BARNES, Circuit Judge.

Appellant Henry, jointly with the defendant Fuller, was charged with and convicted of knowingly receiving and possessing twenty-two packages of pressure regulators which had been stolen from an interstate shipment of goods. (18 U.S.C. § 659.)

Error is claimed in five particulars: (1) the insufficiency of the evidence that appellant *knew* the goods had been stolen; (2) that the trial judge coerced the verdict; (3) that the appellant was required to defend his innocence as to other stolen items; (4) that a new trial should have been granted upon the ground of newly discovered evidence; and (5) that there was prejudicial misconduct by the United States Attorney in his summarization to the jury.

We find the only point of any substance is the first. Obviously, there could be no direct evidence, save from the appellant himself, as to his state of mind — whether

he knew or did not know the merchandise was stolen. He testified on his own behalf, but was not asked, nor did he testify, whether or not he knew the regulators were stolen.

[1] Such lack of direct evidence, however, does not end the matter. There were various facts in evidence which, if believed by the jury, entitled it to infer appellant had the necessary knowledge.

First: there was testimony the appellant obtained new cardboard cartons in which to place that which he described as "junk" in order to "move" it. One Persley testified "Mr. Henry explained to me they couldn't be moved in the containers they were in." (R.T. 49) "Henry asked me to get the new cartons." (R.T. 68) Persley "knew" the regulators were stolen property. (R.T. 68) Significantly appellant, taking the stand after Persley had testified, denied some of Persley's testimony, but was not asked on direct anything about the containers, or the change thereof.

Second: the appellant received no bill of sale when he acquired the merchandise.

Third: Persley intended to junk the regulators; it was the appellant's idea to sell them.

Fourth: appellant sold the regulators before he had bought them, or paid for them.

Appellant dismissed the first item above as "beside the point." We do not think so. He states the second "shows nothing." We may agree "not much," but we cannot so easily reduce it to zero in evidentiary value. Item three above is disposed of by appellant in his brief by the suggestion that "it was probably misconstrued by the jury."

We think, for example, that the second item is strengthened as circumstantial evidence by the facts: (a) the appellant usually gave a bill of sale when selling merchandise, but here gave none. (b) The appellant usually asked for a bill of sale when purchasing merchandise, but here asked for none. (c) No records were kept of any purchases or sales of merchandise. (Tr. p. 219) (d) The testimony of Persley, alone, if believed, raises a strong inference appellant knew the merchandise was stolen. The appellant urges that the jury "did not properly receive" the testimony of Persley. This is difficult to establish, as a point of law, and boils down to nothing more than counsel's surmise.

[2] All this leads us to the conclusion appellant here attacks a contested issue of fact, decided adversely to appellant by the jury. With such conclusion we are not authorized to interfere. Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); Carroll v. United States, 326 F.2d 72, 75 (9th Cir. 1963).

[3] The trial judge did urge the jury to return a verdict. He did state that they should be able to decide the case, and some little psychological pressure was put on the jury. But such "pressure," if it is that, occurs in many courts on innumerable occasions. Only when it exceeds permissible bounds does it become error. We cannot conclude it exceeds such bounds here.

We find no merit in the other points urged on appeal.

We affirm.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 903

JAMES HENRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for the Southern District of California of knowingly receiving goods stolen from interstate commerce in violation of 18 U.S.C. 659. On December 7, 1964, he was sentenced to imprisonment for a term of three years. The court of appeals affirmed the conviction (361 F. 2d 352).

The facts showed that on or about August 3, 1964, a trailer truck was stolen from a shipping company and was later found abandoned (Tr. 21–24).[1] Stolen from the truck were chemicals, 2 rolls of rugs, 13 cartons of automobile parts, 4 cartons of transmis-

[1] "Tr." designates the transcript of trial proceedings at Volumes II and III of the record on appeal.

sion supports, and 22 cartons of pressure regulators (the latter being the subject of the indictment), all of which were being shipped in interstate commerce (Tr. 32, 34–35). The stolen goods were sold by two unknown men to one John Persley for $300.00 (Tr. 40–41). Later that week, Persley, who then knew that the goods were stolen, told petitioner that two men brought him a truck and that he had "a truckload of stuff" he wanted to get rid of (Tr. 43–45, 88). The following Monday, petitioner agreed to purchase all the pressure regulators, for $110.00. That same day, Persley, together with co-defendant Fuller, delivered the regulators, still in their original shipping containers, to petitioner's used car lot (Tr. 47–49). Petitioner told Persley that he would not accept these goods in their original cartons. Persley thereupon returned to his garage and placed the regulators into used boxes (Tr. 49–50). When petitioner finally accepted the regulators, he did not request a bill of sale (Tr. 94), although he normally sought such documents with other purchases (Tr. 219).

Sometime later, petitioner delivered these regulators to the Industrial Production Supply Company, a wholesaler for such goods (Tr. 116). An attempt was made to resell them to the Meeder Equipment Co., and the regulators were seized by local authorities, who had previously warned the Meeder Company of the stolen inventory (Tr. 116–120).

1. The jury retired to deliberate at 2:30 on a Friday afternoon (Tr. 284). At 5:00, the jury was recalled, and it advised the court that no verdict had been reached (Tr. 292). The judge inquired about

the parking problems of the individual jurors (Tr. 292–294), and the following occurred (Tr. 294–296):

COURT. Here is the situation. The case has taken the better part of three days to try, it has cost the Government and defendants some considerable money, if you can arrive at a verdict you should do so. Now I dislike to unexpectedly this way lock a jury up for the night, especially on Friday night when you probably did not anticipate when you left your homes this morning that this would happen, so I think that everyone should make an effort to arrive at a verdict of either guilty or not guilty, and if you think that you can arrive at a verdict, say, by 5:30—is there a 5:30 deadline when they take the [car] keys away?

Juror SCOTT. Yes.

COURT. Do you all have your parking tickets? (Assent.)

My law clerk, Mr. Simpson, can collect the tickets and get the keys if thye will write their names on the back of the tickets and the type of car they have which might expedite matters. Do you think, Mr. Foreman, that you can arrive at a verdict, say, in the next 20 minutes?

FOREMAN. Your Honor, I don't think we can.

COURT. Well, do you think after talking to you now that you might?

FOREMAN. I doubt it.

COURT. I see. Well, I dislike to declare a mistrial because if I declare a mistrial I start over again next Tuesday and it will be before another jury who I don't suspect will be any more intelligent than you. To me it doesn't look like the case is an extremely complicated one, it doesn't have any bookkeeping or account-

> ing features, it is a one-count indictment, you have all heard the evidence, so why don't you go back upstairs and come down here at 20 minutes after 5:00 and see if you can arrive at a verdict in the next twenty minutes.

At 5:40, the foreman of the jury sent a question to the court requesting a summary of testimony relating to the time when petitioner agreed to resell the regulators to the Industrial Production Supply Company (Tr. 297). At 5:50, after review with all counsel, the court advised the jury that petitioner's own testimony indicated that he agreed to resell even prior to his agreement to purchase from Persley (Tr. 302). The jury returned a guilty verdict against both defendants at 6:10 p.m. (Tr. 303).

Petitioner made no objection to the judge's supplementary remarks when they were made or at any later time. In fact, during a hearing on a motion for a new trial, petitioner's counsel expressly stated that he was not taking issue with the procedure followed (Tr. 334).[2] In the court below, petitioner urged for the

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[2] In arguing for a new trial on grounds of newly discovered evidence, petitioner's counsel stated, *inter alia* (Tr. 334–335):

> Mr. BERNARD. I mean this, that it was a Friday, as I understand it, and it was past 5:00 o'clock, and the jurors had not agreed upon a verdict ... .
>
> The COURT. That is right.
>
> Mr. BERNARD. . . . and this Court pressed this jury with a duty to try to reach a verdict, if possible. I am sure this wasn't anything unusual. I am not at issue with what your honor said. I am very familiar how your Honor instructs a jury after they have gone into deliberations, I am not making any criticism of that at all, but I am stating this, that they had not yet agreed and I think your Honor called them down to determine whether or not they

first time that these instructions were coercive and prejudicial.

The judge's remarks were not, in any event, coercive in the same sense as the supplementary instruction in *Jenkins* v. *United States,* 380 U.S. 445. For while the judge attempted, at first, to encourage the jury to reach a verdict promptly, he did not override or criticize the foreman's response that the jury's deliberation was unlikely to be concluded so quickly. And since the judge made arrangements to enable the jurors to retrieve their automobiles from the parking lot, there were no coercive circumstances requiring them to arrive at a verdict. Indeed, the jury demonstrated that it was not coerced by deliberating for more than an hour after the judge's instructions.

2. The determination by the jury that petitioner knew that the regulators were stolen does not warrant review by this Court. Such knowledge may be proved circumstantially. *United States* v. *Spatuzza,* 331 F. 2d 214 (C.A. 7), certiorari denied, 379 U.S. 829; *Robinson* v. *United States,* 333 F. 2d 323 (C.A. 8); *United States* v. *Allegrucci,* 258 F. 2d 70 (C.A. 3). The circumstances of this case warranted an inference that petitioner knew that these regulators had been stolen.

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had agreed at that time. But I feel that a different result would have been obtained, and as your Honor knows in these affidavits for a motion for a new trial, the courts have said that not every detail of a person's testimony necessarily has to be included in the affidavit, if it is substantial and if it appears that a different result might have been obtained that that is sufficient, and I think that there would have been a different result had the testimony of this witness Aaron Fuller been presented to the jury.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

FEBRUARY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967